STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Holbrook, Jr., P.J., and Saad and Talbot, JJ.

DANIEL ADAIR, a Taxpayer of the FITZGERALD PUBLIC SCHOOLS; and FITZGERALD PUBLIC SCHOOLS, a Michigan municipal corporation, et al,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION; DEPARTMENT OF MANAGEMENT AND BUDGET; AND MARK A. MURRAY, TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellees.
_____/

Supreme Court No. 121536

Court of Appeals No. 230858

BRIEF ON APPEAL – APPELLEES

ORAL ARGUMENT REQUESTED

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II. **Whether the claims of those plaintiffs who were not parties to *Durant I* are barred because the current plaintiff school districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8).**

III. **Whether the Court of Appeals erred by granting summary disposition for the defendants on the recordkeeping claim that the Court determined was not barred by either *res judicata* or release.**

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS[1]

Defendants reject Plaintiffs' Statement of Facts and Proceedings because it contains factual inaccuracies and is misleading.

A. General Nature of Action

This case, brought as an original action in the Court of Appeals, involves a Headlee Amendment challenge under the second sentence of Const 1963, art 9, § 29[2] to: (1) certain sections of the Revised School Code, MCL 380.1 *et seq;* (2) section 152 of the State School Aid Act, MCL 388.1752; (3) section 51 of the Pupil Transportation Act, MCL 257.1851; (4) Executive Order 2000-9; and (5) certain special education administrative rules that were promulgated in 1983 and 1987 under the former School Code of 1976.[3] Plaintiffs allege that the State has failed to pay local and intermediate school districts for the necessary increased costs of implementing these statutes and administrative rules and has thereby violated the Prohibition-of-

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[1] This brief does not contain citations to transcripts that would ordinarily be required by MCR 7.212(C)(6) because the record does not contain any transcripts at this point and because MCR 7.211(A)(3) expressly indicates that such citations are not required under these circumstances.

[2] Const 1963, art 9, § 29 provides: The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

[3] 1995 PA 289, § 1, MCL 380.1, amended the title of the former School Code of 1976, 1976 PA 451, to the Revised School Code. 1995 PA 289 also amended other provisions of the code.

Unfunded-Mandates Clause of Const 1963, art 9, § 29,[4] which requires the State to pay in full the necessary increased costs when it mandates units of local government to either perform a new activity or service or to perform an activity or service at an increased level, *i.e.*, a level beyond the level required by state law on December 23, 1978, when the Headlee Amendment took effect.

B. Procedural History

On November 15, 2000, 366 local and intermediate school districts and 364 constituent taxpayers from these districts filed a complaint in the Court of Appeals under the Headlee Amendment, requesting both monetary and declaratory relief. The Court of Appeals has original subject mater jurisdiction under Const 1963, art 9, § 32 to review claims brought to enforce the Headlee Amendment. Defendants filed an answer and brief in support of the answer on December 20, 2000. On January 2, 2001, plaintiffs filed a first amended complaint.

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[4] Const 1963, art 9, § 29 addresses two categories of activities or services required of units of local government by state law. The first sentence addresses activities or services existing in December 1978, the effective date of the Headlee Amendment. This is referred to by the Court of Appeals as the "Maintenance-of-Support Clause" or "MOS Clause". The second sentence of the Amendment addresses new activities or services or increases in the levels of activities or services beyond those existing in December 1978 and is referred to by the Court of Appeals as the "Prohibition-of-Unfunded-Mandates Clause" or "POUM Clause".

C. The Claims Asserted In Plaintiffs' Second Amended Complaint

The plaintiffs in the original and first amended complaints and certain new plaintiffs, comprised of 463 local and intermediate school districts and taxpayers residing in those districts, filed a second amended complaint on April 16, 2001. The description of the second amended complaint found in plaintiffs' brief is inaccurate. In their brief, plaintiffs state that the second amended complaint alleges that 2000 PA 297, the 2000 amendment to the State School Aid Act, MCL 388.1601, *et seq*, violates the second sentence of Const 1963, art 9, § 29, a portion of the Headlee Amendment. (Appellants' Brief, p 1). Plaintiffs further state that the complaint specifically alleges that the activities and services in the complaint are not being funded by operation of 2000 PA 297 and that Plaintiffs seek a declaratory judgment concerning the constitutionality of 2000 PA 297. (Appellants' Brief, p. 2). This is not true. The second amended complaint does not mention or refer to 2000 PA 297. (Appellants' Appendix, 189a-197a)

Count I of the second amended complaint challenges administrative rules promulgated in 1983 and 1987, not 2000 PA 297. In particular, Count I alleges that administrative rules that took effect in 1983 and 1987 "increased the level of special education activities and services required to be provided by school districts in Michigan," (Appellants' Appendix, 190a-192a) and that the State "has failed to pay plaintiff school districts for the necessary increased costs of providing the activities and services set forth in sub-paragraphs 15A-G [sic] . . . ." (Appellants' Appendix, 192a).

Plaintiffs incorrectly cite the administrative rules in Count I as 1999 AACS. (Appellants' Appendix, 190a-192a) This is incorrect because six of the seven administrative rules challenged in Count I were promulgated as part of special education rule revisions that took effect on July 1, 1987 and the seventh, R 340.1758, was promulgated in 1983. Thus, while the second amended

complaint's citation to the rules as 1999 AACS makes it appear that the challenged rules were promulgated in 1999, they were not.

Similarly, Count II of plaintiffs' second amended complaint does not challenge 2000 PA 297. Rather, Count II alleges that section 1284(1) of the Revised School Code, MCL 380.1284(1), has "increased the level of activities and services" for Michigan school districts "by requiring them to provide increased minimum hours of pupil instruction during each school year" as specified in section 1284(1) (Appellants' Appendix, 192a) and that the State "has failed to pay plaintiff school districts for the necessary increased costs of providing these activities and services." (Appellants' Appendix, 193a).

Plaintiffs' brief misstates the allegations in Count II. In footnote 4 of their brief, plaintiffs state that Count II of the second amended complaint challenges increases in the required number of hours and days of pupil instruction. (Appellants' Brief, p 2). While plaintiffs' original and first amended complaints did include allegations in Count II regarding days and hours requirements, the second amended complaint only challenges the hours requirements of MCL 380.1284.

Count III also does not challenge 2000 PA 297. Count III alleges that certain sections of the Revised School Code, the State School Aid Act, the Pupil Transportation Act, and Executive Order 2000-9, specified in subparagraphs 22(A)-(L) of the second amended complaint, were enacted after December 23, 1978, and require Michigan school districts to provide certain "activities and services" as specified in those subparagraphs (Appellants' Appendix, 194a) and that the State "has failed to pay plaintiff school districts for the necessary increased costs of providing said activities and services." (Appellants' Appendix, 196a).

The Court of Appeals described the specific activities and services challenged in Count III:

> (1) an annual financial records audit by a certified public account for intermediate school districts; (2) the instruction of students regarding dangerous communicable diseases; (3) specialized training for teachers regarding human immunodeficiency virus infection and acquired immunodeficiency syndrome; (4) the provision of a breakfast program; (5) the annual development and implementation of a 3-to-5 year school improvement plan; (6) the development of a continuing school improvement process; (7) the provision of a core academic curriculum; (8) the administration of state assessment tests to high school pupils; (9) the provision of remedial educational services and periodic retesting for pupils who fail the required assessment tests; (10) the accreditation of school buildings; (11) the provision of "learning processes" and special and sufficient assistance to each pupil in order to enable each pupil to achieve a state-endorsed diploma; (12) the provision of summer school classes for pupils who fail to meet standards for basic literacy skills or basic mathematics skills by the end of the third grade year; (13) the provision of a minimum of four days of "teacher professional development" in the 2000-2001 school year and a minimum of five days in the 2001-2002 school year and each subsequent school year; (14) the creation and maintenance of data on "essential student data elements" and the transmission of this data via the Internet in a standardized form to the Department of Education (the Court of Appeals refers to this claim as the recordkeeping obligation in ¶ 22K of Count III of plaintiffs' second amended complaint); and (15) the provision of compensation to school bus drivers for time spent attending various trainings and tests. [*Adair v State of Michigan*, 250 Mich App 691, 699-701; 651 NW2d 393 (2002)].

Most of the public acts amending the provisions that are challenged in Count III were not enacted recently, but were instead enacted years ago, between 1987 and 1997, and amended provisions in effect prior to December 23, 1978, the effective date of the Headlee Amendment.

The second amended complaint requests only declaratory relief, specifically, a judgment that the State has failed to meet its funding responsibility under Const 1963, art 9, § 29 "by failing to pay school districts in Michigan for the necessary increased costs of providing activities and services that were first required by state law after December 23, 1978, and increases in the level of activities and services beyond those which were required by state law as of December 23, 1978, in the particulars herein alleged." (Appellants' Appendix, 196a-197a).

D. Subsequent Procedural History

On May 18, 2001, defendants filed a motion for summary disposition. Defendants contended that as to those plaintiffs that were also plaintiffs in the *Durant I* lawsuit, *Durant v*

State of Michigan, 456 Mich 175; 566 NW2d 272 (1997), the claims in the second amended complaint were barred by the doctrine of *res judicata* and that as to the remaining plaintiffs who were not plaintiffs in *Durant I* but who all executed statutory waivers and releases as provided in the State School Aid Act, MCL 388.1611f, the claims in the second amended complaint were barred by the principle of release. MCR 2.116(C)(7). Defendants additionally contended that the second amended complaint failed to state claims on which relief can be granted, that the complaint contained no genuine issues of material fact and that summary disposition was appropriate under MCR 2.116(C)(8) and (10).

Plaintiffs filed a response to defendants' motion for summary disposition on June 19, 2001. Plaintiffs never mentioned 2000 PA 297 in this pleading. Rather, plaintiffs admitted that certain identical second sentence claims were asserted in *Durant I*, but argued that none of their claims under the second sentence were heard by the special master in that case or addressed in subsequent proceedings before the Courts. (Appellees' Appendix, pp 80b-83b). Plaintiffs further asserted that "no decision was ever rendered in [*Durant I*]" on their claims under the second sentence. (Appellees' Appendix, p 82b). Plaintiffs also argued that the statutory releases executed by non-*Durant I* plaintiffs could not affect future claims for underfunding.

Oral argument in the Court of Appeals was held on October 8, 2001. During oral argument, the Court asked several questions about statutory release and waiver and *res judicata*. Desiring to further assist the Court in its deliberations on both issues, on October 12, 2001, the parties filed a joint motion for leave to file supplemental briefs. By order dated October 17, 2001, the Court of Appeals granted this motion. Both parties filed supplemental briefs on November 5, 2001.

It is in the supplemental brief filed on November 5, 2001 that plaintiffs first alleged that 2000 PA 297 failed to meet the State's funding obligations under the POUM Clause of art 9, § 29 and that they seek a declaratory judgment to that effect.

On April 23, 2002, the Court of Appeals granted summary disposition in favor of defendants and dismissed plaintiffs' complaint in its entirety with prejudice. *Adair, supra*, 250 Mich App at 693. The Court held that those plaintiffs who participated in the *Durant I* litigation were barred from prosecuting all but the recordkeeping claim by the doctrine of *res judicata*. The Court further held that the remaining plaintiffs, all of whom executed a statutory release and waiver, were barred from prosecuting the same claims by the principle of release. With regard to the remaining recordkeeping claim in Count III, the Court held that neither the statute nor the executive order at issue mandates a new activity or increase in the level of a mandated activity within the meaning of Const 1963, art 9, § 29.

Judge Saad dissented. While he agreed with the majority's opinion that claims that were or could have been made in *Durant I* or that were settled in 1997 by the non-*Durant I* plaintiffs are barred by *res judicata* or release, he believed that additional fact-finding was necessary to determine whether all claims were, in fact, barred.

On May 14, 2002, plaintiffs filed a motion for immediate consideration and application for leave to appeal in this Court contending that the Court of Appeals had erroneously applied the doctrines of release and waiver and *res judicata,* that neither release and waiver nor *res judicata* apply in an action for declaratory relief under the POUM Clause of Const 1963, art 9, § 29 and that, with regard to the recordkeeping claim, plaintiffs were denied the opportunity to offer proofs in support of their claim.

By Order dated December 18, 2002, this Court granted plaintiffs' motion for leave to appeal, limiting the appeal to the following issues:

(1) whether *res judicata* bars the claims of those plaintiffs who also were plaintiffs in *Durant v State of Michigan*, 456 Mich 175 (1997) [*Durant I*];
(2) whether the claims of those plaintiffs who were not parties to *Durant I* are barred because the current plaintiff school districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8); and
(3) whether the Court of Appeals erred by granting summary disposition for the defendants on the recordkeeping claim that the Court determined was not barred by either *res judicata* or release.

Plaintiffs filed their Brief on Appeal and Appendix on February 12, 2003.[5]

[5] Appellants' Appendix does not comply with the court rules because it contains materials that are not part of the record in this case. MCR 7.307 (A)(5). Defendants object to inclusion of the following documents, which are not part of the record: Court of Appeals' Order Consolidating Cases dated August 10, 1993, (p 2a); Court of Appeals' Order Appointing Special Master dated June 22, 1994, (p 4a); Fourth Amended Complaint dated June 29, 1994, (p 6a); Court of Appeals' Order Granting Leave to File Amended Complaint dated August 3, 1994, (p 20a); Excerpt from transcript of proceedings before Special Master dated December 9, 1994, (p 22a); Court of Appeals' Order entering judgments dated September 19, 1995, (p 36a); 2000 PA 297, (p53a); Center for Educational Performance and Information – Single Record Student Database – Frequently Asked Questions, (p 211a).

ARGUMENT

I. *Res judicata* bars the claims of those plaintiffs who also were plaintiffs in *Durant v State of Michigan*, 456 Mich 175 (1997).

A. Standard of Review

The application of *res judicata* is a legal question that appellate courts review *de novo*. *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994).

B. Argument

Plaintiffs offer three arguments to demonstrate that the Court of Appeals erred in concluding that *res judicata* bars the claims of plaintiffs in this case who were also plaintiffs in *Durant I*. Each of these arguments misapplies or misstates applicable legal principles and should be rejected by this Court.

1. The Court of Appeals was correct when it held that the claims in this case and the claims in *Durant I* arise from the same transaction.

The Court of Appeals held that the claims in this case and the claims in *Durant I* arise from the same transaction and therefore *res judicata* bars the claims of the plaintiffs in this case who were also plaintiffs in *Durant I*. Because all three of the requirements of *res judicata* are met in this case, the Court of Appeals was correct when it held that all the claims of the *Adair* plaintiffs that were also plaintiffs in the *Durant I* case, with the exception of the recordkeeping claim, are barred by *res judicata*.

The doctrine of *res judicata* (or claim preclusion) was judicially created in order to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 381; 596 NW2d 153 (1999), *quoting Hackley v Hackley*, 426 Mich 582, 585; 395 NW2d 906 (1986). *Res judicata* prevents the relitigation of

facts and law between the same parties or their privies. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 161; 294 NW2d 165 (1980).

This Court has been clear that our State has adopted a "broad approach" to the application of *res judicata*. This means that the doctrine applies in a subsequent action between the same parties, not only to points upon which the previous court was actually called upon by the parties to form an opinion and pronounce a judgment, "but to every point which properly belonged to the subject of litigation" and which the parties, exercising reasonable diligence, "might have brought forward at the time." *Pierson Sand and Gravel, Inc, supra,* 460 Mich at 381. This broad approach to the doctrine of *res judicata* ensures finality and prevents repetitive litigation and claim splitting. Plaintiffs are obligated to advance in a single proceeding every alternative basis for recovery and their failure to do so bars relitigation of the claim. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 217; 561 NW2d 854 (1997), citing *Gose, supra,* 409 Mich at 163.

Thus, "[a] second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was *or could have been* resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 81 (1999) (emphasis added).

There is no dispute that the first and third requirements are met in this case. *Durant I* was a final decision on the merits.[6] The decision of this Court is reported at 456 Mich 175 and includes a majority opinion that begins at page 181 and continues through page 221. The claims were all aimed at one core problem that the Court addresses in its opinion – underfunding by the State under the Headlee Amendment.

As to the third requirement, both *Durant I* and the present action involve the same parties or their privies. Eighty-one of the eighty-four school districts that sued the State in *Durant I* are plaintiffs in *Adair*. (See Appellees' Appendix, pp 18b-27b). A privy is a person who is so identified in interest with another that he represents the same legal right. *Sloan v Madison Heights*, 425 Mich 288, 295; 389 NW2d 418 (1986); *Baraga County v State Tax Commission*, 466 Mich 264, 269-270; 645 NW2d 13 (2002). Privity requires both a "substantial identity of interests" and a "working or functional relationship" between the party and the nonparty. *Phinisee v Rogers*, 229 Mich App 547, 553-554; 582 NW2d 852 (1998). The interests asserted by the school districts and taxpayers in *Durant I* and the school districts and taxpayers in this case are identical—a declaratory judgment under the Headlee Amendment. The working or functional relationship between the school districts and the taxpayers could not be closer because

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[6] *Durant I* was a consolidation of three groups of original actions filed in the Court of Appeals under the Headlee Amendment, Const 1963, art 9, § 32, that were assigned Michigan Supreme Court Docket Numbers 104458-104492. The first (*Durant v State of Michigan*) was filed on behalf of the Fitzgerald school district and 7 of its taxpayers. The second (*Schmidt v State of Michigan*) was filed by 51 taxpayers and 51 school districts. The third involved 33 cases that had been held in abeyance while *Schmidt* was pending before the Supreme Court. See *Durant v State of Michigan*, 456 Mich 175, 183-188 (1997). Money damages without interest were awarded to the plaintiff school districts for underfunding during 1991-92, 1992-93, and 1993-94, the period from the first year after the Court of Appeals ruled on the issues of liability until the Proposal A Amendment to Const 1963, art 9, § 11 changed the method of financing public education. *Durant v Michigan,* 456 Mich 175, 214 (1997).

they are virtually indistinguishable for purposes of a Headlee Amendment lawsuit. *Waterford School District v State Board of Ed,* 98 Mich App 658, 667; 296 NW2d 328 (1980).

a. *Res judicata* bars this action because the matter contested in this case was or could have been resolved in *Durant I.*

Thus, the question before this Court involves the second requirement of *res judicata* – that the matter contested in the second action was or could have been resolved in the first. This element is satisfied because the claims in *Durant I* and the claims in this case arise from the same transaction and were or could have been resolved in *Durant I.*

In *Durant I* a number of school districts that are plaintiffs in this action successfully sued the State for underfunding certain activities, including special education. *Durant I* was filed in 1980 and concluded seventeen years later, with the issuance of this Court's opinion on July 31, 1997. The consolidated *Durant I* litigation generated five published Court of Appeals opinions and three opinions by this Court. These opinions established a number of significant points, including the determination that elementary and secondary education as a whole was not a state mandated activity and that the proper focus of claims under art 9, § 29 are more specific programs and activities, such as special education, special education transportation, driver's education, and school lunch programs. *Durant, supra,* 456 Mich at 184-185.

All of the claims in this action, except the recordkeeping claim, accrued during the period when the *Durant I* litigation was pending. That the claims asserted in this case either were or, with the exercise of reasonable diligence, could have been asserted by plaintiffs in the consolidated *Durant I* case is conclusively established by the fact that some of the same claims were previously asserted in the consolidated *Durant I* cases. (See Fourth Amended Complaint in *Dede Andreae et al v Michigan,* Court of Appeals No. 93569, found in Appellees' Appendix,

pp 5b-8b; 12b-14b). Additionally, plaintiffs conceded at oral argument that all the claims included in the second amended complaint, except the recordkeeping claim, could have been raised while *Durant* I was pending. *Adair, supra*, 250 Mich App at 704.

With respect to the special education claims in Count I of the second amended complaint, plaintiffs contend that claims under the MOS Clause and claims under the POUM Clause are mutually exclusive and that different evidence is needed to support these claims. Plaintiffs allege that *Durant I* addressed only their MOS claim and that the POUM claim was not resolved. But while the claims may be mutually exclusive, plaintiffs pleaded violations of both clauses in *Durant I,* the case was litigated to conclusion, and money damages for the special education claims were awarded. Plaintiffs were compensated for the underfunding of the special education claims in *Durant I* and cannot now be permitted to split and relitigate these claims and judgments. *Durant v Dep't of Ed (After Remand, On Third Remand)*, 213 Mich App 500, 502; 541 NW2d 278 (1995).

In *Durant I*, this Court awarded money damages without interest to the plaintiffs for underfunding during 1991-92, 1992-93 and 1993-94, the period from the first year after the Court of Appeals ruled on the issues of liability until the Proposal A Amendment to Const 1963, art 9, § 11 changed the method of financing public education. *Durant, supra,* 456 Mich at 214. The calculations that formed the basis of the money judgments were established by proceedings conducted by the Honorable James E. Meis. In 1994, Judge Meis was appointed to serve as Special Master to hear the claims of the plaintiffs relating to alleged underfunding under art 9, § 29. The Special Master had two tasks: (1) to determine the statewide base year funding percentages for the five mandated activities; and (2) to determine the factual claims of underfunding for each plaintiff school district. *Id.* at 505-507.

Testimonial evidence was not required for either issue because the parties stipulated to both the state financed proportion of the necessary costs of the five mandated activities and to the amount of underfunding claimed by each plaintiff district. *Id.* Thus, plaintiffs raised the claims and offered the proofs that established the underfunding in *Durant I.* Plaintiffs had control of the proofs and had every opportunity to present and/or challenge the process. By stipulation, plaintiffs accepted that the amounts were accurate and represented underfunding of all the special education claims in the litigation, including claims for reimbursement of increased costs related to the special education rules. If plaintiffs believed that the judgments in *Durant I* were not accurate because they did not include amounts for POUM Clause violations, they had the obligation to raise this challenge at that time and cannot now be heard to attack these judgments. To allow plaintiffs to proceed in this case would thwart the important purposes of *res judicata* – finality of litigation and economy of judicial resources. *Jones v State Farm Mutual Ins. Co.,* 202 Mich App 393, 401; 509 NW2d 829 (1993).

b. Plaintiffs have not established that there is a state mandated obligation under the POUM Clause to fund the activities or services in the second amended complaint.

With regard to Counts II and III of the second amended complaint, plaintiffs have not established an obligation under the POUM Clause to fund the activities because the activities do not constitute mandated activities within the meaning of art 9, § 29. Count II concerns the required hours of pupil instruction in the Revised School Code, MCL 380.1284(1). This Court has held that the required days of pupil instruction is not a mandate under the School Code or the Headlee Amendment. *State Bd of Ed v Houghton Lake Community Schools*, 430 Mich 658, 677; 425 NW2d 80 (1988) (no clear legal duty on the part of the school district to provide 180 days of instruction); *Oakland Co v Michigan*, 456 Mich 144, 157; 566 NW2d 616 (1997) (180 days of instruction not a required activity for purposes of the Headlee Amendment); *Durant v State Bd of*

Ed, 424 Mich 364, 387; 381 NW2d 662 (1985). The same analysis applies with respect to the hours of instruction. MCL 388.1701(3).

With regard to Count III, all of these claims, except the recordkeeping claim, were asserted or could have been asserted in *Durant* I. Additionally, plaintiffs have not established an obligation under the POUM Clause to fund the activities in Count III because the statutory provisions involve matters of general school operations that do not constitute activities or services required by state law within the meaning of art 9, § 29. *Durant, supra*, 424 Mich at 386-388; *Durant v Dep't of Ed (On Second Remand),* 186 Mich App 83, 95; 463 NW2d 461 (1990). (See discussion under Argument III, *infra).*

c. The sound jurisprudential considerations of *res judicata* are particularly important in Headlee Amendment cases.

The sound jurisprudential considerations of *res judicata* that insure the finality of litigation and conserve judicial resources are particularly important in Headlee Amendment cases. "*Res judicata* is a manifestation of the recognition that endless litigation leads to vexation, confusion and chaos for the litigants, and inefficient use of judicial time." *Rogers v Colonial Federal Savings & Loan Ass'n of Grosse Pointe Woods,* 405 Mich 607, 615; 275 NW2d 499 (1979). In *Durant I,* this Court emphasized the need to resolve Headlee issues quickly and completely, stating that cases under the Headlee Amendment should:

> proceed to rapid decision on the issue of whether the state has an obligation under art 9, § 29 to fund an activity or service. The Court of Appeals would give declaratory judgment on the obligation of the state. If there was such an obligation, we anticipate that the state would either comply with that obligation no later than the next ensuring fiscal year, unless it could obtain a stay from this Court, or remove the mandate. [*Durant,* 456 Mich at 205.]

In holding that money damages are not an available remedy for a violation of the POUM Clause of art 9, § 29, the Court of Appeals has further explained that, because claims brought under the second sentence address future services or activities and the State's obligation to fund

such activities or services, the proper remedy is a resolution of the parties' prospective rights and obligations by declaratory judgment. *Wayne Co Chief Executive v Governor,* 230 Mich App 258, 266; 583 NW2d 512 (1998). The Court then provided the following direction to plaintiffs seeking to assert a claim under the POUM Clause of § 29:

> The specific course of action a claimant faced with an unfunded new activity or service should take is to refuse to fund the activity or service in question, while at the same time seeking a declaratory judgment on its obligations under the Headlee Amendment to fund those services. *Durant v Michigan,* 456 Mich 175, 205, 210; 566 NW2d 272 (1997). The state would then either have to fund the activity, remove the mandate, or obtain a stay from the judiciary. *Id.* at 205-206. [*Id* at 266-267].

The obvious reason that plaintiffs are required to promptly assert such claims for declaratory relief is so that the State may become aware at the earliest possible time of any financial adjustment to allow for future compliance with art 9, § 29. *Oakland Co., supra,* 456 Mich at 166. It is necessary for the State to become aware of such financial adjustment at the earliest possible time so that the State may decide whether to fully or partially repeal the mandate or to fund the mandate in subsequent annual state budgets. Only by requiring plaintiffs to promptly assert such claims are the courts able to promptly grant declaratory relief, if warranted, thereby providing the State with the judicial determination necessary to guide the State's future compliance with art 9, § 29.

Thus, plaintiffs may not split Headlee claims and bring serial suits over time when the underlying statutes or administrative rules have not changed. Plaintiffs must try their whole case at one time and may not prosecute a claim in pieces or present only a portion of the grounds on which relief is sought and leave the rest to be litigated later. It is a principle of sound jurisprudence that at some point, litigation over a particular controversy must end. *Jones, supra,* 202 Mich App at 403.

d. The Court of Appeals correctly used a transactional analysis to determine that there is an identity of claims for purposes of *res judicata.*

Plaintiffs contend that under the same evidence test their instant claims are not barred by *res judicata.* Rather than use this test, the Court of Appeals used a transactional analysis to determine that there is an identity of claims between those raised in *Durant I* and this case and, therefore, that *res judicata* barred plaintiffs' instant action. This "transactional" test is consistent with the broad approach taken by Michigan courts that "*res judicata* will apply to bar a subsequent relitigation based upon the same transaction or events" (*Pierson Sand and Gravel, Inc., supra,* 460 Mich at 380) and reflects the current trend that holds that the claim is coterminous with the transaction itself. 1 Restatement Judgments, 2d, § 24, comment a, p 196-197. The Court of Appeals' reasoning is also consistent with the modern view of *res judicata* contained in the Restatement of Judgments, 2d, and should be followed in this case because it furthers the important considerations underlying the *res judicata* doctrine: promotion of fairness, finality of litigation and economy of judicial resources, *Jones*, *supra*, 202 Mich App at 401, considerations that are particularly crucial in cases challenging state funding under the Headlee Amendment.

This Court frequently looks to the Restatement of Judgments, 2d, in determining whether *res judicata* precludes the litigation of subsequent claims. *Pierson, supra,* 460 Mich at 379, n. 9. The Restatement has rejected the same evidence test in favor of the transactional test. Describing the dimensions of a claim for purposes of merger or bar, *i.e., res judicata*, the Restatement provides the following general rules:

> Dimensions of "Claim" for Purposes of Merger or Bar – General Rule Concerning "Splitting"
> (1)When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, * * * the claim extinguished includes all rights of the plaintiff to remedies against the defendant

> with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction" and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. [1 Restatement Judgments, 2d, § 24, p 196.]

The commentary following these general rules explains that historically, when forms of action were divided between law and equity, plaintiffs could maintain multiple actions on multiple claims based on different theories of the law, the invasion of different primary rights or because different evidence supported the claims. Under the modern view, however, the claim is coterminous with the transaction itself.

> The present trend is to see claim in factual terms and make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split. [1 Restatement Judgments, 2d, § 24, comment a., p 197.]

Applying the general rules described above, a claim is extinguished even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action or to seek remedies or forms of relief not demanded in the first action. 1 Restatement Judgments, 2d, § 25, p 209. Under this approach,

> a mere shift in the evidence offered to support a ground held unproved in a prior action will not suffice to make a new claim avoiding the preclusive effect of the judgment. It is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late." [1 Restatement Judgments, 2d, § 25, comment b, p 210.]

The commentary notes that the rule obligates the plaintiff to present all facts, evidence, grounds, theories of the case and remedies or form of relief relevant to the claims in the first action. *Id.*, at

210. Numerous courts in other states as well as a majority of federal courts have applied this transactional analysis in determining whether there is an identity of causes of action for purposes of the doctrine of *res judicata.* See *River Park, Inc. v City of Highland Park,* 184 Ill2d 290, 312; 703 NE2d 883 (1998) for a list of these cases. Consequently, the Court of Appeals did not err by using the "transactional" analysis.

Applying the transactional test to the claims in this matter, it is clear that the claims in *Durant I* and the claims in this case arise from the same transaction. Some of the claims in this matter were raised in *Durant I* and all of the claims in this case, except the recordkeeping claim, arose when the *Durant I* litigation was pending and could have been raised in that suit. Viewing these claims in factual terms, there is an identity in the causes of action between *Durant I* and this case. The claims in both cases seek to address the violation of the same legal right, the right to be adequately funded by state appropriations as provided by the Constitution. This Court has consistently held that the two sentences of art 9, § 29 must be read together because they are aimed at alleviating two possible manifestations of the same voter concern – underfunding by the State. *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 603; 597 NW2d 113 (1999); *Durant, supra,* 424 Mich at 379; *Schmidt v Dep't of Ed,* 441 Mich 236, 250-251; 490 NW2d 584 (1992).

For the reasons described above, it is clear that the Court of Appeals correctly applied the doctrine of *res judicata* when it held that the claims in this case and the claims in *Durant I* arise from the same transaction and that *res judicata* bars the claims of those plaintiffs who were also plaintiffs in *Durant I.*

2. 2000 PA 297 does not prevent application of the doctrine of *res judicata* in this case.

Plaintiffs argue that the subject of this suit is the 2000 amendment to the State School Aid Act, 2000 PA 297; specifically, that the State is failing to meet its funding obligation to school

districts under the POUM Clause of art 9, § 29 by operation of 2000 PA 297, a statute passed three years after this Court's ruling in *Durant I.* (Appellants' Brief, p 9). Plaintiffs assert that 2000 PA 297, which put in place a new funding mechanism for the payment of state school aid, is a new or intervening circumstance between the conclusion of the *Durant I* litigation in 1997 and the filing of the complaint in this case in November 2000. (Appellants' Brief, pp 11-12). Thus, plaintiffs contend that since 2000 PA 297 had not been enacted when *Durant* I was resolved, *res judicata* does not apply to bar the action in this case.

Defendants recognize that legislative changes to the State School Aid Act following this Court's 1997 decision in *Durant I* can validly trigger litigation under art 9, § 29 of the Headlee Amendment to challenge changed methods of funding or newly imposed mandates. In fact, many of the plaintiffs in this case have brought two such actions against these defendants, both of which proceeded to final judgment. In *Durant II, Durant v State of Michigan (On Remand),* 238 Mich App 185; 605 NW2d 66 (1999), plaintiffs alleged that the 1997 and 1998 versions of the State School Aid Act violated art 9, § 29 and were unconstitutional. The Court of Appeals held that those acts complied with the Headlee Amendment but violated the constitutional guarantee of a specific base level of unrestricted aid per pupil mandated by the Proposal A Amendment, Const 1963, art 9, § 11. *Id.,* at 191. And, as described below, a third case was filed in the Court of Appeals in November, 2000 (*Durant III*), challenging the then current version of the State School Aid Act, 2000 PA 297, under the Headlee Amendment and the Proposal A Amendment. This case also proceeded to final judgment.

However, plaintiffs' argument that the enactment of 2000 PA 297 shows *res judicata* should not be applied to the instant case is disingenuous and incorrect. First, plaintiffs have not shown that 2000 PA 297 imposed a new mandate or increased the level of an existing mandate.

Therefore, plaintiffs have no basis on which to assert that this version of the State School Aid Act fails to meet the State's funding obligations under the POUM Clause of art 9, § 29.

Moreover, the second amended complaint did not include allegations concerning 2000 PA 297. In addition, at the time that plaintiffs filed this case, they were simultaneously plaintiffs in the case of *Durant v State of Michigan,* 251 Mich App 297; 650 NW2d 380 (2002), (*Durant III),* a case that specifically attacked 2000 PA 297 as violating the Headlee Amendment, Const 1963, art 9, § 29 and the Proposal A Amendment, Const 1963, art 9, § 11. Allegations that 2000 PA 297 violated the POUM Clause could have and should have been raised in that case. *Durant III* has proceeded to final judgment. On May 10, 2002, the Court of Appeals ruled that 2000 PA 297 is constitutional, meeting the requirements of both constitutional amendments. *Id.* at 310. By order dated November 19, 2002, this Court denied plaintiffs' delayed application for leave to appeal and on February 28, 2003, this Court denied plaintiffs' motion for reconsideration of that order.

In presenting their arguments, not only do plaintiffs attempt to change the factual basis for their claim, plaintiffs muddy the waters further by arguing issues relative to collateral estoppel not *res judicata.* To support their argument that *res judicata* does not apply in this case, plaintiffs cite *Socialist Workers Party v Secretary of State,* 412 Mich 571; 317 NW2d 1 (1982). *Socialist Workers Party* holds that although an issue has been actually litigated and determined by a valid and final judgment, relitigation of an issue in the case is not precluded when the issue is one of law and a new determination is warranted to take account of an intervening change in the applicable legal context or otherwise avoid the inequitable administration of the law. *Id.* Plaintiffs argue that the legislative enactment of 2000 PA 297 is such a change in legal context which would allow relitigation of their Headlee claim. However, plaintiffs' reliance on *Socialist Workers Party* is misplaced. First, *Socialist Workers Party* addressed issues of collateral

estoppel, not *res judicata*. In particular, this Court relied on the exception found in § 68.1 of the Restatement Judgments, 2d (Tentative Draft No 1, 1973) pp 170-171, to support this conclusion. *Id.* at 583-584. That portion of the Restatement refers to an exception to the doctrine of issue preclusion, or collateral estoppel. Collateral estoppel precludes relitigation of an issue in a different action between the same parties where the prior proceedings ended in a valid, final judgment and the issue was actually litigated and necessarily determined. *Id.* The term "*res judicata*" refers to what is also called claims preclusion. This relates to the preclusive effect of a judgment on a subsequent proceeding on the basis of the same cause of action. *People v Gates,* 434 Mich 146, 154; 452 NW2d 627 (1990). Second, Plaintiffs have not articulated how or why 2000 PA 297 represents an intervening change in the applicable legal context. To the extent plaintiffs believed that the State was not meeting its funding obligations in 2000 PA 297, that factual claim should have been raised in *Durant III*.

3. *Res Judicata* applies to preclude the relitigation of claims that were raised in *Durant I*.

Finally, plaintiffs argue that *res judicata* does not apply in this case because the allegations of violations of the POUM Clause were plead late in the proceedings in *Durant I* and were not considered or decided by the courts in that litigation. Plaintiffs contend that it is the

[redacted]

damages for special education claims were awarded and paid. Plaintiffs cannot split their claim and challenge these awards now. Additionally, plaintiffs' argument does not withstand scrutiny because it essentially ignores a crucial aspect of the second *res judicata* requirement. Michigan has adopted a broad application of *res judicata* that bars claims contested in the second action that either were or *could have been* resolved in the first. *Pierson Sand and Gravel, Inc., supra,* 460 Mich at 381. Obviously, if *res judicata* operates to bar claims that *were not*—but *could have been*—brought, as the Michigan courts have made clear it does, it operates to bar claims that were never actually adjudicated on the merits. *VanderWall v Midkiff,* 186 Mich App 191, 201-202; 463 NW2d 219 (1990). It is not necessary that a particular issue be decided for *res judicata* to apply. Moreover, the issue does not even have to be raised for *res judicata* to apply, even if it is an issue that a party should have raised. *Id.* Thus, the doctrine of *res judicata* applies to preclude the relitigation of issues that were raised late in the prior proceedings as well as issues that were arguably not decided in the prior litigation. 1 Restatement Judgments, 2d § 25, Comment b, p 201, *supra.*

II. The claims of those plaintiffs who were not parties in *Durant I* are barred because the current plaintiff school districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8).

A. Standard of Review

The interpretation of a release presents a question of law for this Court to decide. *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994).

B. Argument

1. Factual Background.

After the Supreme Court awarded monetary relief to the plaintiffs in *Durant I*, the Legislature passed legislation to provide a comparable level of taxpayer money for local and

intermediate districts that were not plaintiffs in the *Durant*[7] case. This taxpayer money represented offers of settlement and compromise to each non-plaintiff school district to resolve, in their entirety, any claim or claims that were or could have been asserted by the school district for violations of the Headlee Amendment that are or were similar to the claims asserted by the plaintiffs in *Durant*. The procedures to be followed by local and intermediate districts to avail themselves of this settlement option are found in §§ 11f-i of the State School Aid Act, MCL 388.1611f-388.1611i.

According to the terms and conditions of subsection 11f(1) and (2) of the State School Aid Act, MCL 388.1611f (1) and (2), each of these non-*Durant I Adair* plaintiffs presented to the State Treasurer substantially identical resolutions - duly executed and approved by their respective school boards - "waiving any right or interest the district or intermediate district has or may have in any claim or litigation based on or arising out of any claim or potential claim through September 30, 1997 that is or was similar to the claims asserted by the plaintiffs in the

[7] See 1997 PA 142 which amended the State School Aid Act to add §§ 11f-i; 1997 PA 143, which amended the Public School Employees' Retirement Act and 1997 PA 144 which amended the Management and Budget Act.

consolidated cases known as *Durant v State of Michigan.*"[8] The State, in turn, agreed to pay each of these releasing plaintiffs varying amounts that totaled nearly $449 million.[9]

2. The Court of Appeals' ruling.

The Court of Appeals held that the plaintiff school districts that executed the statutory releases under MCL 388.1611f (and the taxpayer plaintiffs from those districts) are precluded by the terms of those releases from prosecuting all but the recordkeeping claim raised in the second amended complaint. The Court held that the language of the releases is clear and unambiguous. The Court recognized that all claims in the second amended complaint alleging violations of the POUM Clause of art 9, § 29, with the exception of the recordkeeping claim, existed before September 30, 1997. Because the claims predate the execution of the releases and because an action for declaratory relief under the POUM Clause accrues upon the issuance of the mandate

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[8] This legislative approach was called the "*Durant* Solution". See memo from Arthur Ellis, Superintendent of Public Instruction to Intermediate School District superintendents attached in Appellees' Appendix, pp 28b-38b. A copy of the board resolution of each of the releasing plaintiffs was attached in the Appendix to Defendants' Supplemental Brief dated November 5, 2001, and is part of the record in this case. For the Court's convenience, defendants have included two sample board resolutions in the Appendix in this Court. These samples are representative of all the resolutions executed by these plaintiffs. (Appellees' Appendix, pp 39b-42b) As required by the statute, no school district received funds unless its release conformed to the statutory conditions, MCL 388.1611f(1) and (2), and all the non-*Durant I* plaintiffs have received funds. Bay Arenac Community High School is not included. Bay Arenac Community High School is a public school academy authorized by Bay-Arenac Intermediate School District, a plaintiff in this case. As a public school academy, Bay-Arenac Community High School is organized under the nonprofit corporation act and is not a municipal corporation. See MCL 380.502. For purposes of this matter, Bay-Arenac Community High School suffers no injury that is different than its authorizing body. Additionally, because a public school academy may not levy *ad valorem* taxes or any other tax for any purpose, MCL 380.503(8), there is no injury to taxpayers.

[9] These amounts, set forth at MCL 388.1611h(1), are also found in Appellees' Appendix, pp 18b-27b.

regardless of whether the underfunding has occurred, *Oakland, supra,* at 151, n 4; *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 266-267; 583 NW2d 512 (1998), the Court held that all claims except the recordkeeping claim constitute potential claims within the meaning of the release. Thus, the Court granted summary disposition in favor of the state with regard to these claims and these plaintiffs pursuant to MCR 2.116(C)(7). *Adair*, 250 Mich App at 706-707.

Similar to the argument concerning *res judicata*, those plaintiffs in this case that were not plaintiffs in *Durant I*, but who each executed the statutory release, now contend that their entire claim is premised on the Legislature's failure to fund in 2000 PA 297 obligations required under the POUM Clause of art 9, § 29. Plaintiffs further contend that this action seeks a declaratory judgment that 2000 PA 297 does not meet these funding obligations. These Plaintiffs assert that this case does not concern whether the activities or services contained in the allegations in the second amended complaint were required as of the effective date of the Headlee Amendment in December 1979. Rather, this case only concerns the State's alleged ongoing failure to fund these mandated activities and services. (Appellants' Brief, p 17). These plaintiffs argue that waivers that related to funding under prior versions of the State School Aid Act cannot bar challenges to a subsequent version of the Act that changed the "funding mechanism" for Michigan schools. (Appellants' Brief, p 18).

But for the reasons described in Section I, B of this Brief, *supra*, this argument is without merit. Plaintiffs' arguments fail because the language in the releases unequivocally describes the class of claims waived to include any such claim "that is or was similar to the claims asserted by the plaintiffs in the consolidated cases known as *Durant v State of Michigan*." An examination of the claims in the second amended complaint reveals that the claims in Counts I are claims that either were asserted by a *Durant* plaintiff or could have been asserted. Thus, they are included in

the terms of the executed release. Moreover, the claims in Counts II and III do not constitute mandated activities within the meaning of art 9, § 29.[10]

Whether 2000 PA 297 adequately funds POUM Clause obligations is not the relevant question here because plaintiffs have not first established that there is an obligation under art 9, § 29 to fund the activities cited in the second amended complaint. Without a determination that the activity or service is mandated under art 9, § 29, there is no obligation to fund it. Moreover, plaintiffs' argument is an impermissible collateral attack on the judgment of the Court of Appeals in *Durant III. Durant v State of Michigan, supra.* Claims concerning 2000 PA 297 should have been raised in that case. Therefore, as described below, because the language of the release is clear and unambiguous and because it refers to claims arising out of both clauses of art 9, § 29, the claims of these plaintiffs in this case are barred because these plaintiffs released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8).

Plaintiffs do not challenge the validity of these releases and do not dispute that each of these plaintiffs in fact executed and submitted releases; nor have they suggested that the State has in any way failed to discharge its obligations undertaken in the settlement as described in the State School Aid Act. Accordingly, the task before this Court is straightforward. The interpretation of a release presents a question of law for the Court to decide. *Patterson, supra,* 447 Mich at 433-435, cited in *Cole v Ladbroke Racing Mich, Inc,* 241 Mich App 1, 13; 614 NW2d 169 (2000). See also, *Wyrembelski v City of St Clair Shores,* 218 Mich App 125, 127;

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[10] Count II concerns the required hours of pupil instruction in the Revised School Code, MCL 380.1284(1). This Court has held that the required days of pupil instruction is not a mandate under the Headlee Amendment. *State Bd of Ed, supra,* 430 Mich at 677 (no clear legal duty on the part of the school district to provide 180 days of instruction); *Oakland Co, supra,* 456 Mich at 157 (180 days of instruction not a required activity for purposes of the Headlee Amendment); *Durant, supra,* 424 Mich at 387. The same analysis applies with respect to the hours of instruction. MCL 388.1701(3).

553 NW2d 651 (1996) (summary disposition of a plaintiff's complaint is proper where there exists a valid release of liability between the parties.)

In interpreting valid releases, courts in Michigan have consistently held that the scope of a release is controlled by the intent of the parties as expressed in the release. *Collucci v Eklund,* 240 Mich App 654, 658; 613 NW2d 402 (2000), citing *Rinke v Automotive Moulding Co,* 226 Mich App 432, 435; 573 NW2d 344 (1997). If the text of the release is clear and unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. *Id.* The fact that the parties may dispute the meaning or application of a release does not establish an ambiguity. *Cole, supra,* 241 Mich App at 14, citing *Gortney v Norfolk & Western R Co,* 216 Mich App 535, 540; 549 NW2d 612 (1996). In fact, if the terms of the release are unambiguous, contradictory inferences are "subjective and irrelevant." *Gortney, supra,* 216 Mich App at 541.

The releases in this case are somewhat unique because, while they represent valid contractual agreements, they arise from legislation. However, this Court has made clear that state contractual obligations may be created by legislation where the Legislature unambiguously expresses its intention to create the obligation. *In re Certified Question (Fun 'N Sun RV Inc v Mich),* 447 Mich 765, 777-778; 527 NW2d 468 (1994) (citations omitted). Moreover, the rules of statutory construction are similar to those that apply to the interpretation of releases. In construing statutes, the courts discern and give effect to the intent of the Legislature by examining the language of the statute itself. If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. *Sun Valley Foods Co v Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999).

Applying these principles, the releases are controlled by their plain language because they are unambiguous and unequivocal. Examining the text of the releases and related statutory

provisions, it is clear that each of these plaintiffs waived "any right or interest it may have in any claim or potential claim through September 30, 1997. . . ." This language is all-encompassing; no claims are reserved. The language evidences a clear intent to waive claims in the broadest possible terms through the specified date. See *Gortney, supra,* 216 Mich App at 541 (where the release applies to "any" claim its scope is broad and releases all claims.)

Subsection 11f(4) of the State School Aid Act, MCL 388.1611f(4), speaks clearly to settle and compromise "any claim or claims" "in their entirety" that these districts may have asserted "for violations of section 29 of article IX of the state constitution of 1963." Had there been any intention to limit the force of this settlement to MOS Clause challenges or to declaratory judgments or to fixed rather than so-called continuing violations, this is where that intent would have been expressed and it was not. Similarly, the words of the releases themselves speak in terms of waiving any interest the district may have "by reason of the application of Section 29 of Article IX of the State Constitution of 1963." Again, no limitation is stated here and it is not within the power of the courts to add one. *Gortney, supra,* 216 Mich App at 541-542.

The Court of Appeals correctly applied the principle of release and waiver to bar the claims of these plaintiffs. The claims of those plaintiffs who were not parties in *Durant I* are barred because the current plaintiff school districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8).

III. The Court of Appeals correctly granted summary disposition for defendants on the recordkeeping claim because this activity does not constitute a new activity or an increase in the level of a state mandated activity within the meaning of Const 1963, art 9, § 29.

A. Standard of Review

Review of this claim is a legal question that appellate courts review *de novo*. *Wayne Co Chief Executive, supra*, 230 Mich App at 263.

B. Argument

In Count III of their second amended complaint, plaintiffs allege that by operation of a provision of the State School Aid Act, MCL 388.1752, and Executive Order No. 2000-9,[11] which require school districts to create and maintain student information and data, the State has failed to pay school districts for the necessary increased costs of providing this activity or service. (Appellants' Appendix, p 196a).

The Court of Appeals held that neither the statute nor the executive order, separately or in combination, mandate a new activity or increase in the level of a state mandated activity within the meaning of the POUM Clause of § 29 of the Headlee Amendment. *Adair, supra*, 250 Mich App at 711. The Court held that the obligation of school districts to gather, keep, and report data to the State Department of Education is an obligation that existed long before the Headlee Amendment was passed by the voters. The Executive Order, which creates the Center for Educational Performance and Information (CEPI), a temporary agency responsible for gathering educational and other data from school districts and storing and managing the data collected, does not mandate a new activity within the meaning of the Headlee Amendment because the data

[11] Executive Reorganization Order 2000-9, challenged in Count III, paragraph 22(K), moved this existing requirement to a newly created state agency. Under 2002 PA 191, § 94a, MCL 388.1694a, this agency has now been moved to the Department of Management and Budget.

is already in the possession of plaintiff school districts and agencies in various forms as a by-product or necessary consequence of general school operations. *Id.* at 713-714. The Court granted summary disposition in favor of the State with regard to this recordkeeping claim.

Plaintiffs argue that the Court of Appeals erred in holding that the recordkeeping claim and the creation of the CEPI is not a new activity or service or an increase in the level of an activity or service. Plaintiffs further contend that granting summary disposition under MCR 2.116(C)(10) without providing plaintiffs the opportunity for an evidentiary hearing and an opportunity to offer proofs in support of their claim is erroneous. (Appellants' Brief, p 21) Plaintiffs are clearly wrong.

There is no requirement in the Constitution, statutes, or case law that requires the Court of Appeals to conduct an evidentiary hearing with regard to this claim. There is no reason or need to incur the cost of an evidentiary hearing or the expense of a special master. The question at issue is whether the recordkeeping claim constitutes a new activity or service or an increase in the level of an activity or service within the meaning of art 9, § 29. Review of this claim involves a question of law and courts review such constitutional issues *de novo. Wayne County Chief Executive, supra,* 230 Mich App at 263

Claims brought under the POUM Clause seek to establish that a statute creates a new activity or service or an increase in the level of an activity or service. The appropriate remedy for a claim brought under the POUM Clause of art 9, § 29 is declaratory judgment. *Id,* at 265-266. An action for declaratory relief under the POUM Clause accrues upon the issuance of the mandate, regardless of whether the underfunding occurred. *Adair, supra*, 250 Mich App at 691 citing *Oakland Co, supra,* 456 Mich at 151, n4; *Wayne Co Chief Executive, supra*, 230 Mich App at 266-267. It is expected that such actions will proceed rapidly to decision and that the

Court of Appeals will determine by declaratory judgment whether the State has an obligation under the Amendment. *Durant, supra,* 456 Mich at 205.

Plaintiffs claim error because the Court of Appeals had no basis for its conclusion that the additional requirements of the recordkeeping claim were "insufficient to implicate the required funding" under the POUM Clause. (Appellants' Brief, p 22). But this is not what the Court of Appeals held. Rather, the Court ruled that the obligations contained in the statute and executive order, either separately or in combination, do not mandate a new activity or increase in the level of a state-mandated activity within the meaning of the POUM Clause. *Adair, supra,* 250 Mich App at 711. If the claim does not constitute a state mandated activity or service under the Headlee Amendment, there clearly is no obligation under Headlee to fund it.

Plaintiffs assert that they are prepared to show, and that MCR 2.116(C)(10) requires they be given subsequent opportunity to show, the substantial additional costs incurred in complying with the requirements of the CEPI. (Appellants' Brief, pp 21-22).[12] Plaintiffs are mistaken. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. MCR 2.116(G)(4) provides:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

[12] In their Appendix Plaintiffs have included a document prepared by CEPI and the address for the CEPI website. These documents are not part of the record in this case and should be struck from the record in this Court. MCR 7.307(A)(5).

Plaintiffs have not submitted any specific facts showing that there is a genuine issue. Three documents were attached to plaintiffs' answer to defendants' motion for summary disposition: (1) a 1997 memorandum from Terry L. Bergstrom, Research Analyst at the Legislative Service Bureau to the Honorable Kirk Profit, State Representative describing the Headlee Amendment implementing legislation; (2) a memorandum dated July 5, 2000 from the Director of the Office of Special Education and Early Intervention Services in the Department of Education to school districts describing the process for requesting reimbursement of funds under a provision of the State School Aid Act; and (3) the Report of Special Master James E. Mies in *Durant I.* Plaintiffs offer only a promise to produce and this Court has clearly held that this is not enough.

> A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.
>
> Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the Court rules. . . . The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999) (citations omitted).

Thus, plaintiffs promise to offer evidence of increased costs does not show the Court of Appeals erred in granting summary disposition on this claim.

Finally, plaintiffs mistakenly contend that the Court of Appeals erred in ruling that the gathering and transfer of data to a central location for use in evaluating the efficiency of the educational delivery process and developing improved methods of providing K-12 education are

"administrative functions that constitute the essence of the state's constitutional obligation 'to maintain and support a system of free public education'" under Const 1963, art 8, § 2. *Id.* at 714.

This Court and the Court of Appeals have long recognized that not all functions performed by a school district are required by state law within the meaning of the Headlee Amendment. *Durant v Dep't of Ed (On Remand),* 129 Mich App 517, 524; 342 NW2d 591 (1983). There are provisions in the Revised School Code relating to aspects of general school operations such as a core academic curriculum, school improvement plans, assessments, and accreditation that are so inextricably involved in the role and responsibilities of each local school board that they are not requirements imposed by state law under § 29 of the Headlee Amendment. *Durant v State Bd of Ed, supra,* 424 Mich at 388. *Durant, supra,* 186 Mich App at 95.

When this Court held early in the *Durant I* litigation that "education is not an activity or service required by state statute or state agency rule," *Durant v State Bd of Ed,* 424 Mich at 388, it was referring to the type of statutory provisions such as the reporting requirements at issue here. This Court cited curriculum as an example of a statutory provision so rooted in the historic power of local school boards to control the day-to-day academic, administrative and fiscal matters of their district that it could not be a requirement imposed by state law under § 29:

> The board of education in each of the school districts is directly responsible to the local voters and, with their input, determines what courses will be offered, what the goals of the school system will be, how much teachers will be paid, the number of schools, the requirements for graduation, the number of teachers and administrators, transportation matters, and almost every other matter necessary to the proper running of a school district. See, e.g., *Lintz v Alpena Public Schools,* 119 Mich App 32; 325 NW2d 803 (1982).
>
> Were we to accept plaintiffs' claims, the state would be authorized to determine and fund only what it deemed "necessary," in clear contravention of the tradition of local control. Theoretically, the state could become inextricably involved in every aspect of the school board's role, determining the number of pencils required on the one hand and computing the necessary teachers' salaries on the

> other. Such a result is inconsistent with the historic ability of school districts to use funds as they see fit; a system of local control and local accountability is in keeping with the clear desire of the voters in passing the Headlee Amendment. [*Durant v State Bd of Ed,* 424 Mich at 386-387 (1985).

The Court of Appeals relied on this reasoning when dismissing Count V of Plaintiffs' complaint in *Durant I. Durant v Dep't of Ed (On Second Remand), supra,* 186 Mich App at 95. Count V included statutory provisions similar to those included in count III of Plaintiffs' second amended complaint.

This Court has also recognized that including this type of statutory provision within the definition of "state law" for purposes of the Headlee Amendment would be contrary to the intent of the people who ratified the Amendment. By expanding the activities that qualify as state mandates under § 29, the inevitable result would be tax increases, a consequence that is squarely at odds with the ceiling placed on taxes and revenues and the State's obligation to maintain a balanced budget. *Durant, supra,* 424 Mich at 384-385.

The Headlee Amendment reflects an effort by the voters to prevent the Legislature from shifting responsibility for services to units of local government once its revenues were limited by the Headlee Amendment, in order to save the money the State would have had to spend if it were providing the service itself. *Durant v State Bd of Ed, supra,* 424 Mich at 379. But not all legislative changes result in such revenue shifting. *Judicial Attorneys Ass'n, supra,* 460 Mich 603. The State can mandate higher standards or benefits without violating the Headlee Amendment. *Id.* In such a case, the Headlee Amendment is not implicated and there is no Headlee violation. *Id.*

The Headlee Amendment cannot operate to freeze legislative discretion. *Schmidt v Dep't of Education,* 441 Mich at 242. *Judicial Attorneys Ass'n, supra,* 460 Mich at 605-607; *Durant v State of Michigan, supra,* 251 Mich App at 307-308. Thus a balance must be struck between the

dual goals of "a) preserving the Legislature's ability to enact necessary and desirable legislation in response to changing times and conditions and b) guaranteeing a predictable level of minimum funding." *Judicial Attorneys, supra,* 460 Mich at 605.

Plaintiffs' allegation that they are incurring increased costs because of the recordkeeping requirements does not transform this responsibility into a state mandate for purposes of the Headlee Amendment. *Id* at 595. To adopt plaintiffs' arguments would freeze legislative discretion in a manner completely at odds with the intent of the people who ratified the Headlee Amendment and violate the Amendment itself. The Headlee Amendment does not guarantee that spending levels of local units of government will not increase from the level in 1978. "Increased levels of local spending attributable to other causes, e.g., inflation or the greater utilization of a program by the public, are not addressed by this provision of the Headlee Amendment." *Id.*

Thus, the Court of Appeals correctly granted summary disposition for defendants on the recordkeeping claim because this activity does not constitute a new activity or an increase in the level of a state mandated activity within the meaning of Const 1963, art 9, § 29.

RELIEF SOUGHT

For the reasons described in this Brief, Defendants-Appellees respectfully request that this Honorable Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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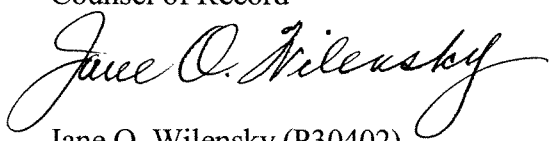

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